Datuk S Nallakaruppan & Ors v Datuk Seri Anwar bin Ibrahim and other appeals

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COURT OF APPEAL (PUTRAJAYA) — APPEAL NOS W-02(IM)(NCVC)-153–01 OF 2013, W-02(IM)(NCVC)-249–01 OF 2013 AND W-02(IM)(NCVC)-261–01 OF 2013

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ABDUL AZIZ AB RAHIM, DAVID WONG AND ABANG ISKANDAR JJCA

29 MAY 2015

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Evidence — Previous proceedings — Evidence of previous proceedings not admissible — Evidence Act 1950 s 43 — Defendants who were sued for defamation pleaded justification, qualified privilege and fair comment based on previous convictions of plaintiff — Whether s 43 of the Evidence Act 1950 ('Act') barred defendants from relying on judgments in previous criminal proceedings — Whether defendants also could not rely upon ss 52 and 55 of the Act to refer to plaintiff's previous conviction as evidence of bad character — Whether ss 52 and 55 only allowed evidence of general reputation and general disposition to prove bad or good character and not evidence of particular acts — Whether remarks in previous criminal judgment against plaintiff based on inadmissible evidence remained personal opinion of judge who made it and had little or no probative value in subsequent civil proceeding

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The respondent had filed a defamation suit in the High Court against the three appellants cited in Appeal No 153 herein. The suit was based on an article published by the second appellant in the Malay language daily, *Utusan Melayu*, of which the third appellant was the editor. The article attributed to the first appellant words imputing the respondent was a bisexual and unfit to be leader of the Opposition in Malaysia. In their statements of defence, all three appellants relied upon justification, qualified privilege and fair comment as well as (a) the fact that the respondent was previously convicted on four charges of corrupt practices under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 and (b) a remark made in a majority judgment of the Federal Court in 2004 — when it allowed the respondent's appeal against a conviction on a Penal Code sodomy offence — that there was evidence to show he was involved in homosexual activities. The respondent applied to strike out several paragraphs of the defence of the three appellants on the ground s 43 of the Evidence Act 1950 barred them from pleading, by way of justification, qualified privilege and fair comment, the judgments of previous criminal cases involving him. Section 43 provided that 'Judgments, orders or decrees other than those mentioned in ss 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provisions of this Act'. The High Court allowed the respondent's application in

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so far as the impugned paragraphs related to the defence of justification but not where they related to the defences of qualified privilege and fair comment. The rationale for the ruling was that (a) the defence of qualified privilege was available to the appellants because it attached to the occasion or circumstances of the publication of the defamatory statement and not to the statement itself so that even if the statement later turned out to be untrue, so long as they had acted responsibly and not indifferently or recklessly as to the truth of the statement, they would be protected as the defence of qualified privilege was predicated on public interest and responsible journalism and the media's duty to disseminate information of public importance (b) the defence of fair comment was also available to the appellants as the defamatory statement was published as a comment/expression of opinion on the judgment commented upon. In the instant appeals against the High Court's decision, the second and third appellants, relying upon the phrase 'or is relevant under some other provisions of this Act' in s 43 of the Evidence Act 1950, argued that a previous criminal judgment was relevant under ss 52 and 55 of the Evidence Act 1950 to show the respondent's bad character so as to adversely impact his claim for damages in the defamation suit.

Held, dismissing Appeal Nos 153 and 249 and allowing Appeal No 261:

(1) A judgment in a criminal case could not be used as proof of a fact in issue in a civil case for claim for damages. As to the appellants' defence of justification, the High Court was right to hold that s 43 of the Evidence Act 1950 barred them from relying on the judgment, order or decree of another court proceeding, more so, a criminal proceeding (see paras 23–24).

(2) As to the pleas of qualified privilege and fair comment, the High Court was wrong in applying a different test. This was not a proper way to interpret and apply a statutory provision. There was only one test and that was whether the judgment relied upon was relevant. Once it was decided that under s 43 a judgment in another proceeding was not relevant to the civil proceedings at hand, then it was not relevant for all purposes unless it could be brought within the 'exception' in s 43 (see para 27).

(3) Under ss 52 and 55 of the Evidence Act 1950, conviction for criminal offence was not relevant as evidence of bad character. The explanation to s 55 made it very clear that only evidence of general reputation and general disposition was admissible to prove bad or good character. It could not be proved by a particular act. On the facts, the appellants by relying on the conviction of the respondent in the second sodomy case and the remark by the Federal Court as to the plaintiff's act of homosexual activities in the first sodomy case were, in fact, relying on

particular acts to show his general reputation and general disposition. This was incorrect and not permitted by virtue of the explanation to s 55 (see para 30).

(4) The remark made by the Federal Court in the 2004 case involving the respondent was based on inadmissible evidence. Technically and judicially speaking, there was no evidence to support that remark and it remained a personal opinion of the judge who had expressed it. Such remarks as evidence of facts in another case had little or no probative value (see para 20).

[Bahasa Malaysia summary

Responden telah memfailkan guaman fitnah di Mahkamah Tinggi terhadap tiga perayu yang dinamakan dalam Rayuan No 153. Guaman itu berdasarkan artikel yang diterbitkan oleh perayu kedua dalam akhbar berbahasa Melayu, *Utusan Melayu*, yang mana perayu ketiga adalah editor. Artikel itu ditujukan kepada perayu pertama dengan perkataan-perkataan yang menyatakan responden adalah seorang biseksual dan tidak sesuai untuk menjadi ketua Parti Pembangkang di Malaysia. Dalam penyataan pembelaan mereka, kesemua tiga perayu bergantung kepada justifikasi, perlindungan bersyarat dan ulasan saksama dan juga (a) fakta bahawa responden sebelum ini telah disabitkan atas empat kesalahan amalan rasuah di bawah s 2(1) Ordinan Kecemasan (Kuasa-Kuasa Penting) No 22 Tahun 1970 dan (b) kenyataan yang dibuat dalam penghakiman majoriti Mahkamah Persekutuan pada tahun 2004 — apabila ia membenarkan rayuan responden terhadap sabitan atas kesalahan liwat — bahawa terdapat keterangan untuk menunjukkan dia terlibat dalam aktiviti homoseksual. Responden memohon untuk membatalkan beberapa perenggan kepada pembelaan ketiga-tiga perayu itu atas alasan s 43 Akta Keterangan menghalang mereka daripada merayu, melalui justifikasi, perlindungan bersyarat dan ulasan adil, penghakiman-penghakiman kes-kes jenayah sebelum ini yang melibatkannya. Seksyen 43 memperuntukkan bahawa 'Judgments, orders or decrees other than those mentioned in ss 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provisions of this Act'. Mahkamah Tinggi membenarkan permohonan responden setakat mana perenggan-perenggan yang dipersoalkan berkaitan dengan pembelaan justifikasi tetapi bukan di mana ia berkaitan dengan pembelaan untuk perlindungan bersyarat dan ulasan saksama. Rasional untuk membuat keputusan tersebut adalah bahawa: (a) pembelaan perlindungan bersyarat tersedia kepada perayu-perayu kerana ia berkaitan dengan kejadian atau keadaan berhubung penerbitan kenyataan berunsur fitnah itu dan bukan kepada kenyataan itu sendiri menyebabkan jika pun kenyataan itu kemudian didapati tidak benar, selagi mereka telah bertindak dengan bertanggungjawab dan tidak membeza atau melulu berhubung kebenaran kenyataan itu, mereka dilindungi kerana pembelaan perlindungan bersyarat itu bergantung kepada

kepentingan awam dan tanggungjawab kewartawanan dan kewajipan media untuk menyebarkan maklumat yang mempunyai kepentingan awam; (b) pembelaan ulasan saksama juga tersedia kepada perayu-perayu kerana kenyataan berunsur fitnah diterbitkan sebagai ulasan/ungkapan pendapat tentang penghakiman yang diulas itu. Dalam rayuan-rayuan ini terhadap keputusan Mahkamah Tinggi, perayu-perayu kedua dan ketiga, bergantung kepada istilah 'or is relevant under some other provisions of this Act' dalam s 43 Akta Keterangan 1950, berhujah bahawa penghakiman jenayah sebelum ini adalah relevan di bawah ss 52 dan 55 Akta Keterangan 1950 untuk menunjukkan perwatakan responden yang tidak baik agar memberi kesan bertentangan terhadap tuntutannya untuk ganti rugi dalam guaman fitnah.

Diputuskan, menolak Rayuan No 153 dan No 249 dan membenarkan Rayuan No 261:

(1) Penghakiman dalam kes jenayah tidak boleh digunakan sebagai bukti tentang fakta dalam isu kes sivil untuk tuntutan ganti rugi. Berhubung pembelaan justifikasi perayu-perayu, Mahkamah Tinggi adalah betul untuk memutuskan bahawa s 43 Akta Keterangan 1950 menghalang mereka daripada bergantung kepada penghakiman, perintah, dikri prosiding mahkamah lain, lebih-lebih lagi, prosiding jenayah (lihat perenggan 23–24).

(2) Berhubung pli-pli untuk perlindungan bersyarat dan ulasan saksama, Mahkamah Tinggi terkhilaf dalam menggunapakai ujian berbeza. Ini bukan cara yang wajar untuk mentafsir dan menggunapakai suatu peruntukan statutori. Hanya terdapat satu ujian sahaja dan ia adalah sama ada penghakiman yang mereka bergantung kepada itu relevan. Setelah diputuskan bahawa di bawah s 43 suatu penghakiman dalam prosiding lain adalah tidak relevan kepada prosiding sivil ini, maka ia tidak relevan bagi semua tujuan lain kecuali ia terangkum di bawah 'pengecualian' dalam s 43 (lihat perenggan 47).

(3) Dalam ss 52 dan 55 Akta Keterangan 1950, sabitan untuk kesalahan jenayah adalah tidak relevan kerana keterangan perwatakan tidak baik. Penjelasan kepada s 55 menjelaskan dengan nyata bahawa satu-satunya keterangan berhubung reputasi am dan kecenderungan am boleh diterima untuk membuktikan perwatakan tidak baik atau baik. Ia tidak boleh dibuktikan dengan satu tindakan tertentu. Berdasarkan fakta, perayu-perayu dengan bergantung kepada sabitan responden dalam kes liwat kedua dan kenyataan oleh Mahkamah Persekutuan berhubung perbuatan plaintif berhubung aktiviti homoseksual dalam kes liwat pertama adalah, sebenarnya, bergantung kepada perbuatan-perbuatan tertentu untuk menunjukkan reputasi am dan kecenderungan amnya. Ini adalah salah dan tidak dibenarkan menurut penjelasan kepada s 55 (lihat perenggan 30).

(4) Kenyataan yang dibuat oleh Mahkamah Persekutuan dalam kes 2004 melibatkan responden adalah berdasarkan keterangan yang tidak boleh diterima. Secara teknikal dan kehakiman, tidak terdapat keterangan untuk menyokong kenyataan tersebut dan ia masih merupakan pendapat peribadi hakim yang menyatakannya. Kenyataan sedemikian sebagai keterangan fakta dalam kes lain tiada nilai probatif (lihat perenggan 20).]

Notes

For a case on evidence of previous proceedings not admissible, see 7(2) *Mallal's Digest* (5th Ed, 2015) para 2728.

Cases referred to

Barclays Bank Ltd v Cole [1966] 3 All ER 948, CA (refd)
Choo Michael v Loh Shak Mow [1994] 1 SLR 584, HC (refd)
DP Vijandran v Karpal Singh & Ors [2000] 3 MLJ 22, HC (refd)
Dato' Seri Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar Shah & Anor (Civil Appeal No W-02–741 of 2000 (unreported), CA (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2004] 3 MLJ 405, FC (refd)
Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad [2001] 2 MLJ 65; [2001] 1 CLJ 663, FC (refd)
Goody v Odhams Press Ltd [1966] 3 All ER 369, CA (refd)
Gopalkrishna Gupthan v Ammalu Ammal And Ors AIR 1972 Ker 196, HC (refd)
Hollington v F Hewthorn & Company Limited [1943] 2 All ER 35, CA (refd)
Hunter v Chief Constable of West Midlands and another [1981] 3 All ER 727, HL (refd)
Jorgensen v News Media (Auckland) Limited [1969] NZLR 961, CA (refd)
Ong Tua Chor v Lee Beng Tong [1976] 1 MLJ 187 (refd)
She Eng Gek v Da De Silva [1957] 1 MLJ 55 (refd)
YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd [1997] 2 MLJ 621, CA (refd)

Legislation referred to

Emergency (Essential Powers) Ordinance No 22 of 1970 s 2(1)
Evidence Act 1872 [IND] s 43
Evidence Act 1950 ss 40, 41, 42, 43, 52, 54 explanation 2, 53, 54, 55
Evidence Act 1997 [SG] ss 45, 45A
Penal Code s 377B
Rules of the High Court 1980 O 18 r 19

Appeal from: Civil Suit No 23NCVC-42–03 of 2012 (High Court, Kuala Lumpur)

Muhammad Shafee Abdullah (Sarah Maalini Abishegam with him) (Shafee &

Co) in Appeal No W-02(IM)(NCVC)-153–01 of 2013 for the appellant.
Firoz Hussein bin Ahmad Jamaluddin (Muhammad Asmirul Asraf bin Fadli with him) (Hafarizam Wan & Aisha Mubarak) in Appeal No W-02(IM)(NCVC)-249–01 of 2013 for the appellants.
Shahid Adli bin Kamaruddin (Michelle Yesudas with him) (Daim & Gamany) in Appeal No W-02(IM)(NCVC)-261–01 of 2013 for the appellant.
Firoz Hussein bin Ahmad Jamaluddin (Muhammad Asmirul Asraf bin Fadli with him) (Hafarizam Wan & Aisha Mubarak) in Appeal No W-02(IM)(NCVC)-261–01 of 2013 for the respondents.
Shahid Adli bin Kamaruddin (Michelle Yesudas with him) (Daim & Gamany) in Appeal Nos W-02(IM)(NCVC)-153–01 of 2013 and W-02(IM)(NCVC)-249–01 of 2013 for the respondent.

Abdul Aziz Ab Rahim JCA (delivering judgment of the court):

THE APPEALS

[1] There are three appeals before us:

(a) Appeal No W-02(IM)(NCVC)-153–01 of 2013 — the first defendant/appellant appealed against the High Court decision on 26 December 2012 allowing in part the plaintiff/respondent's application to strike out certain paragraphs in the first defendant defence — paras 1, 1.1–1.3, 9(f), (g), (h), 10.1–10.7 and 18;

(b) Appeal No W-02(IM)(NCVC)-249–01 of 2013 — the second defendant and the third defendant/first appellant and the second appellant respectively appealed against the same High Court decision allowing the plaintiff/respondent's application to strike out paras 1.1–1.8 of the second defendant and the third defendant's defence in respect of defence of justification; and

(c) Appeal No W-02(IM)(NCVC)-261–01 of 2013 — the plaintiff/respondent appealed against the same High Court decision dismissing the plaintiff's application to strike out the respondent/first defendant, second defendant, third defendant defence in paras 1.1–1.8 of the second defendant and third defendant defence relating to qualified privilege.

All the three appeals arose from the High Court decision given on 26 December 2012 in Kuala Lumpur Civil Suit No 23NCVC-42–03 of 2012.

MATERIAL FACTS

[2] The plaintiff had filed the defamation suit against all three defendants arising from the publication of an article in a Malay daily *Utusan Melayu*, entitled 'Anwar Bisexual, tak boleh jadi Ketua Pembangkang – Nalla' ('the

impugned article'). The words in the impugned article are attributed to first defendant. The second defendant is the publisher of the Malay daily who published the impugned article. The third defendant is the editor of the Malay daily *Utusan Melayu*.

[3] The second and third defendants had filed a joint defence. The first defendant filed his own separate defence. All the three defendants however have raised justification, qualified privilege and fair comment as part of their defence.

[4] In the relevant paragraphs of the statement of defence, all three defendants relied on the following facts in criminal cases including the plaintiff to support their defences:

(a) the plaintiff previous conviction for four charges of corrupt practices under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 on 24 April 1998; and

(b) The remark in the majority judgment of the Federal Court in *Dato' Seri Anwar bin Ibrahim (plaintiff in this case) v Public Prosecutor and another appeal* [2004] 3 MLJ 405 to the effect that there was evidence to show the plaintiff was involved in homosexual activities, though the plaintiff was successful in his appeal before the Federal Court against his conviction for a charge of sodomy under s 377B of the Penal Code.

THE PLAINTIFF'S/RESPONDENT'S SUBMISSION

[5] Learned counsel for the plaintiff argued that the plea contained in the impugned paragraphs of the defendants' defences should not be allowed as it contravened s 43 of the Evidence Act 1950 and ought to be struck out.

FINDINGS BY HIGH COURT

[6] The learned judicial commissioner of the High Court Justice Vazeer Alam Mydin Meera, after considering submission by counsel and the authorities cited to him concluded at para 27 of his judgment as follows:

> [27] Though I find the arguments of counsel for the defendants highly persuasive, and the rationale for reform advanced by the English Court of Appeal in the *Barclay's Bank Ltd*'s case to be compelling, until there is statutory amendment to s 43 of the Evidence Act, I would have to follow judicial precedent and accept the proposition that a previous conviction cannot be adduced in evidence to prove truth of that conviction. Though the common law position embodied in *Hollington*'s case has been rejected by many common law jurisdictions including the land of its birth, the statutory embodiment of that rule in s 43 of the Evidence Act stands undisturbed in this country and this court has to give effect to that law as it stands.

A The position in the United Kingdom and Singapore has been changed following statutory intervention.

The learned judicial commissioner also relied on *Dato' Seri Anwar bin Ibrahim v Abdul Khalid @ Jafri bin Bakar Shah & Anor* (Civil Appeal No W-02–741 of 2000 (unreported) where the Court of Appeal struck out a plea of the plaintiff's criminal conviction to found justification a defence in a libel case by virtue of s 43 of the Evidence Act 1950 and said that '... in as much as I may think that this area of the law may be ripe for reform, the doctrine of stare decisis would require me to follow that judicial precedent'.

[7] The next case considered by the learned judicial commissioner is the Federal Court case of *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 2 MLJ 65; [2001] 1 CLJ 663 — referred to by counsel for the defendants. The respondent in that case had relied on the conviction of two persons, one Dr Munawar Ahmad Anees ('Munawar') and Sukma Dermawan Saasmitaat Madja ('Sukma') on charges that they had allowed the applicant there (the plaintiff here) to sodomise them to support his defence of justification. The respondent/defendant in that case was successful before the High Court and Court of Appeal to have the suit against him struck off. The appellant then applied for leave to appeal to Federal Court on the question, inter alia, whether in a defamation action, the High Court can decide on the defence of justification and qualified privilege without a trial to dismiss the plaintiff suit under O 18 r 19 of the Rules of the High Court 1980. The Federal Court answered the question in affirmative and said that the trial judge in that case had correctly addressed the issues of justification and qualified privilege on the facts admitted and the confession as to the acts of gross indecency in the criminal cases involving Munawar and Sukma. Counsel for the defendants in the present appeals submitted that the Federal Court case is the authority for the proposition that the findings in a criminal trial can be used as defence of justification in a civil action. The learned judicial commissioner however rejected this argument on the ground that the Federal Court in that case did not consider the effect of s 43 of the Evidence Act and moreover it was just an observation by the Federal Court made in the course of considering an application for leave to appeal. In the result, the learned judicial commissioner concluded at para 31 of his judgment as follows:

> [31] I find that for reasons stated above, s 43 of the Evidence Act would prohibit a defendant in a libel action to found justification by reliance on the judgments, orders, or decrees from some other legal proceedings.

THE DEFENDANTS'/APPELLANTS' SUBMISSION

[8] In these three appeals before us, counsel for the appellants in Appeal Nos 153 and 249 had urged this court to be inspired and to interpret s 43 broadly

and to move with the time by taking the development in UK, Hong Kong, New Zealand and Singapore in this area of law into consideration. It was submitted that the law in s 43 of the Evidence Act is an embodiment of a common law rule laid down in the English case of *Hollington v F Hewthorn & Company Limited* [1943] 2 All ER 35. This decision had been cited with approval by our courts. See *She Eng Gek v Da De Silva* [1957] 1 MLJ 55, *Ong Tua Chor v Lee Beng Tong* [1976] 1 MLJ 187 and *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621 (CA) and *DP Vijandran v Karpal Singh & Ors* [2000] 3 MLJ 22. However, it was submitted that *Hollington*'s case is no longer good law. The alternative argument by the defendants (with regard to s 43 of the Evidence Act 1950) is not to strike out the impugned paragraphs of the defences based on s 43 of the Evidence Act but to allow the evidence to run and the applicability of s 43 of the Evidence Act is to be decided by the trial judge at or during the trial. This alternative argument was advanced by Tan Sri Mohammad Shafee of counsel for the first defendant/appellant in Appeal No 153.

THE ISSUE

[9] Thus, the core issue in these appeals is the applicability of s 43 of the Evidence Act and whether the defendants are prevented by s 43 of the Evidence Act from relying on the facts pleaded in the impugned paragraphs of the relevant statement of defences in respect of which the plaintiff had applied to strike out.

OUR OPINION

[10] Section 43 of the Evidence Act 1950 provides that:

> Judgments, orders or decrees other than those mentioned in ss 40, 41 and 42 are irrelevant unless the existence of such judgment order or decree is a fact in issue or is relevant under some other provisions of this Act.

[11] Having read and re-read s 43 above, we are of the view that there is no ambiguity in the section that as a matter of evidence, judgment, order or decree is irrelevant except where the existence of such judgment, order or decree is a fact in issue or that such judgment, order or decree is relevant under some other provisions of the Act. With respect to the last limb of s 43 which reads '… or is relevant under some other provisions of this Act', we will come back to address this later. For the time being, suffice for us to say that the only exception, if we may use that expression, that makes judgment, order or decree relevant under s 43 as a matter of evidence is where the judgment, order or decree is relevant for the purpose of ss 40, 41 and 42 of the Evidence Act 1950. However, neither of those three sections are in issue in these appeals and therefore not applicable; nor the judgment in question is a fact in issue.

[12] We have stated earlier that s 43 of the Evidence Act is embodiment of the common law laid down by the *Hollington*'s case. Learned counsel for all the defendants submitted that, we should depart from the rule in *Hollington*'s case in so far as it is relevant to the interpretation or application of s 43 of the Evidence Act. In arguing this proposition it was submitted that the *Hollington*'s case had been criticised heavily by later cases 'for its total lack of logic and sense' and therefore no longer good law. To support this argument, reference was made to the views expressed by Lord Denning MR in *Goody v Odhams Press Ltd* [1966] 3 All ER 369. And also in the case of *Barclays Bank Ltd v Cole* [1966] 3 All ER 948. In these two cases, Lord Denning MR had expressed the view that the legal position of the *Hollington*'s case rule on the relevancy of a criminal judgment or decision in a civil proceeding or action should be reviewed. In fact very much later the law in England on this point was changed by way of legislative intervention as recommended by the Law Reform Committee.

[13] Learned counsel for the defendants also pointed out to us that the highest court in New Zealand had also criticised *Hollington*'s case as early as 1969 in the case of *Jorgensen v News Media (Auckland) Limited* [1969] NZLR 961 and had refused to follow it. It was further submitted that closer to home, Singapore has an identical provision to our s 43 of the Evidence Act and that Singapore has overcome the problem posed by their s 45 of the Evidence Act by a legislative amendment with the introduction of s 45A. Learned counsel for the defendants cited the Singapore case of *Choo Michael v Loh Shak Mow* [1994] 1 SLR 584, where the learned High Court judge had expressed the opinion that *Hollington*'s case would definitely have been overruled by the House of Lords.

[14] However, we make two observations. First, though Lord Denning MR in the two English cases cited by the defendants counsel had been critical of the *Hollington*'s case decision on the issue, the Master of the Rolls did not go so far as to say that it was no longer good law then. In fact in Barclays the Master of the Rolls said in respect of the rule in *Hollington*'s case: '… it is made possible by the unfortunate decision of the court in *Hollington v F Hewthorn Co Ltd* where it was held that a conviction in a criminal court cannot be used as evidence, not even prima facie evidence in a civil case. I hope that it soon will be altered'.

[15] It is observed that in *Barclays* the other two Lord Justices ie Dankwert LJ and Salmon LJ although agreeing with Lord Denning MR's criticisms of *Hollington*'s case also did not make any pronouncement to the effect of over-ruling or refusing to follow-line *Hollington*'s case rules. It appears that the rule in *Hollington*'s case would have been applicable but for the legislative intervention that amended the law.

[16] Secondly, in respect of the Singapore decision in *Choo Michael*'s case, the learned High Court judge had referred to the judgment of Lord Diplock in *Hunter v Chief Constable of West Midlands and another* [1981] 3 All ER 727 and expressed the view that the *Hollington*'s case 'would have been expressly overruled by the House of Lords if it had not been abolished earlier by statute', and decided not to follow *Hollington*'s case. We note that the decision in *Choo Michael*'s case was in 1993. At that material time s 45 of the Singapore Evidence Act (Chapter 97) which is in pari materia with our s 43 of the Evidence Act 1950 was, and still in force. The learned judge had not considered the effect of s 45 of the Singapore Evidence Act which is the statutory provision applicable then regarding the issue of relevancy and admissibility of previous criminal conviction or judgment in relation to a civil action. Instead, the learned judge had concentrated mainly on the common law position by looking at the English cases and cases from other common law jurisdictions such as United States and New Zealand. We also note that the effect of s 45 of the Singapore Evidence Act on the relevancy and admissibility of previous criminal conviction or judgment by or before a Singapore Court as evidence for the purpose of proving in any proceeding the fact that a person had committed the offence which is in issue was altered only in 2014 with the introduction of a new s 45A in the Singapore Evidence Act. In our view the Singapore decision in *Choo Michael*'s case is not an accurate precedent to follow. This is because we have s 43 which is a statutory provision that expressly provides for the relevancy or otherwise of previous criminal conviction or judgment in a subsequent civil action.

[17] In this regard, we agree with the statement by the learned judicial commissioner in this case at para 27 of his written grounds of judgment as quoted earlier. The courts do not make laws. That is the prerogative of the legislature. The courts only interpret and apply the laws made and passed by the legislature.

[18] Learned counsel for the first defendant in Appeal No 153 further submitted that though the remarks by the learned Justice Hamid Mohamed FCJ in the 2004 sodomy case which involved the plaintiff, could be said to be only an opinion, it is nevertheless an opinion based on evidence and that it had formed part of the court judgment. Therefore the defendants may rely on it to support the defence of justification, fair comment and qualified privilege. It was argued that the word 'judgment' in s 43 ought to include opinions. We are perplexed by this argument. We think learned counsel is trying to split hairs.

[19] No doubt judgment of court consists of opinion of the court as to the facts and evidence adduced before it. However, s 43 is very clear that judgment, order and decree is irrelevant unless they can be brought within the 'exception' under the section. In this respect, learned counsel for the plaintiff submitted if

s 43 prohibits a judgment to be brought in as evidence, *fortiori* reasons or opinions which are orbiter in the judgment cannot also be brought in as evidence. We agree with this submission.

[20] Learned counsel for the first defendant in Appeal No 153 argued that the remark by the Federal Court in the 2004 case is not an orbiter but it is an opinion based on evidence. However, we must emphasise that the remark was based on inadmissible evidence. So technically and judicially speaking therefore, there is no evidence to support that remark. In the circumstances, it remains a personal opinion of the learned judge who had expressed it. Thus, such remarks as evidence of facts in another case would have little or no probative value.

[21] Our s 43 is in pari materia with s 43 of the Indian Evidence Act. Based on the Indian authorities cited to him, learned judicial commissioner concluded that the rationale for the enactment s 43 is that every case is to be treated as a class by itself; and the production of a previous judgment merely establishes the existence of a prior decision. There is no presumption that a prior judgment is the correct decision on the matter. What the law of res judicata establishes is that one cannot go behind the decision in certain similar factual cases based on the ground of public policy. The fact in issue in each case must be proved independently.

[22] The rational underlying s 43 can be gleaned from the statement in *Hollington*'s case which is as follows: 'The Court which has to try the claim for damages knew nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to the court or what influence the court in arriving at its decision. Moreover, the issue in the criminal proceeding in not identical with that raised in claim for damages.' In other words, as said in the Indian case of *Gopalkrishna Gupthan v Ammalu Ammal And Ors* AIR 1972 Ker 196:

> ... it is the duty of the court to scrutinize the soundness or validity of opinion evidence exercising its own independent judgment. In the case of a previous judgment such scrutiny is impossible because the court trying the subsequent case cannot reopen the case and hear it on the merits as if the court is hearing an appeal or is retrying the previous case on fresh evidence. The court in the subsequent case has to decide it on the materials before it exercising its own independent judgment ...

[23] In the face of overwhelming authorities locally and from foreign jurisdictions in particular UK (before the statutory intervention) and India that had been considered by the learned judicial commissioner that a judgment

in a criminal case cannot be used as proof of a fact in issue in a civil case for claim for damages, we are inclined, as the learned judicial commissioner did, to agree with the above statement.

[24] Therefore, with regard to the defendants' defence of justification, we are in agreement with the learned judicial commissioner that s 43 of the Evidence Act would be a bar to the defendants to rely on the judgment or order or decree of another court proceeding more so it is a criminal proceeding.

[25] Now, we address specifically Appeal No 261 where the plaintiff appealed against the decision of the learned judicial commissioner dismissing the plaintiff's application to strike out the same paragraph in the defendants' defence in relation to the defence of qualified privileges and fair comment. The rationale for the learned judicial commissioner for so deciding is that the defence of qualified privilege attached to the occasion or circumstances of the publication of the defamatory statement rather than the statement itself. It is immaterial if the statement may later turn out to be untrue provided the defendant had acted responsibly and not totally indifferent or reckless as the truth of the statement. It was rationalised that the defence of qualified privilege was predicated on the issue of public interest and responsible journalism and that the media has a duty to disseminate information of public importance.

[26] With regard to the defence fair comment, the learned judicial commissioner said that the defendant had the right to this defence of fair comment for the impugned statement are comments and expression of opinion of the judgment commented upon.

[27] It appears to us that the learned judicial commissioner is adopting different test when applying s 43 — one test for plea of justification and another for plea of qualified privilege and fair comments. In our view this is not a proper way to interpret and apply a statutory provision. There should be only one test; and that is whether the judgment relied on is relevant. We are of the view that once it is decided that under s 43 a judgment in another proceeding is not relevant to the civil proceeding at hand, then it is not relevant for all purposes unless it can be brought within the 'exception'. On this issue, with respect, we disagree with the learned judicial commissioner.

[28] The next issue which we would like to discuss is the submission by learned counsel for second defendant and third defendant that criminal judgment is relevant under ss 52 and 55of the Evidence Act to show bad character of the plaintiff that would have impact on claim of damages. This is where the argument by the learned counsel as regard to the last limb of s 43 which says '… or is relevant under any other provision in this Act', is relevant. Learned judicial commissioner, after considering the pleadings, concluded that

it is relevant under s 55 of the Evidence Act 1950 because the defendant is not seeking to rely on a single conviction to establish bad character but also seeking to rely on the pronouncement of the Federal Court as well as on the evidence of witnesses to be called at the trial.

[29] The argument by learned counsel for the second defendant and third defendant raised the issue of interplay between s 52, s 53, s 54 and s 55 of the Evidence Act. However, s 53 and s 54 only apply to criminal proceedings. Therefore, it is not relevant in a civil proceeding. Thus, learned counsel reliance on Explanation 2 in s 54 is, in our view, misplaced.

[30] In civil proceedings, s 52 and s 55 are the relevant provisions. Under these two provisions, conviction for criminal offence is not relevant as evidence of bad character. Furthermore, the explanation to s 55 makes it very clear that only evidence of general reputation and general disposition is admissible to prove bad or good character. It cannot be proved by a particular act. In this regard, we think that the judicial commissioner had erred in concluding that the defendant is relying on general reputation and disposition. On the facts, we are of the view that the defendant by relying on the conviction of the plaintiff in the second sodomy case and the remark by the Federal Court as to the plaintiff's act of homosexual activities in the first sodomy case is in fact relying on particular acts to show general reputation and general disposition of the plaintiff. We do not think that this is correct and permissible by virtue of the explanation to s 55.

[31] Based on the above reasonings, we are unanimous that the appeal by the defendants in Appeal Nos 153 and 249 be dismissed with costs in the sum of RM5,000 to the respondent for each appeal; and that the appeal by the plaintiff in Appeal No 261 be allowed with costs of RM5,000 to the appellants. All deposits to be refunded to the respective appellants.

Appeal Nos 153 and 249 dismissed and Appeal No 261 allowed.

Reported by Ashok Kumar